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In The  
**Supreme Court of the United States**  
October Term, 1998

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MANUEL DEJESUS PEGUERO,  
*Petitioner,*  
v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Writ Of Certiorari To The United States  
Court Of Appeals For The Third Circuit

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**BRIEF OF PETITIONER**

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**QUESTION PRESENTED**

DOES A DISTRICT COURT'S FAILURE TO INFORM THE DEFENDANT OF HIS APPELLATE RIGHTS CONSTITUTE "AN OMISSION INCONSISTENT WITH THE RUDIMENTARY DEMANDS OF FAIR PROCEDURE," THUS JUSTIFYING POST-CONVICTION RELIEF WITHOUT PROOF OF SPECIFIC PREJUDICE?

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**OPINIONS AND ORDERS IN THE COURTS BELOW**

The district court memorandum and order, filed July 1, 1997, has not been published. It is reprinted in the joint appendix at J.A. 168. The court of appeals memorandum opinion and judgment order, filed February 27, 1998, has not been published. It is noted at 142 F.3d 430 (Table), and reprinted in the joint appendix at J.A. 192.

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**STATEMENT OF JURISDICTION**

The judgment of the United States Court of Appeals was entered on February 27, 1998 (J.A. 192). The petition for writ of certiorari was filed on May 22, 1998, and was granted on September 29, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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**RULES INVOLVED**

1. Rule 37(a)(2) of the Federal Rules of Criminal Procedure, effective March 21, 1946, provided as follows:

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be



advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Order of the Supreme Court, February 8, 1946, 327 U.S. 821, 857-58. Rule 37 was abrogated, effective July 1, 1968, by Order of the Supreme Court, December 4, 1967, 389 U.S. 1063, 1066.

2. Rule 32(a)(2) of the Federal Rules of Criminal Procedure, effective July 1, 1966, provided as follows:

(2) **NOTIFICATION OF RIGHT TO APPEAL.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Order of the Supreme Court, February 28, 1966, 383 U.S. 1087, 1107.

3. Effective December 1, 1975, Rule 32(a)(2) of the Federal Rules of Criminal Procedure was amended to provide as follows:

(2) *Notification of right to appeal.* – After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an

appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Order of the Supreme Court, April 22, 1974, 416 U.S. 1001, 1014.

4. Effective December 1, 1989, Rule 32(a)(2) of the Federal Rules of Criminal Procedure was amended to provide as follows:

(2) *Notification of right to appeal.* – After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Order of the Supreme Court, April 25, 1989, 490 U.S. 1135, 1140.

5. Effective December 1, 1994, Rule 32 of the Federal Rules of Criminal Procedure was amended to provide, at Rule 32(c)(5), as follows:

(5) *Notification of right to appeal.* – After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

Order of the Supreme Court, April 29, 1994, 511 U.S. 1175, 1184-85.

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## STATEMENT OF THE CASE

### 1. Overview

In 1992, following his plea of guilty to one count of drug conspiracy, 21 U.S.C. § 846, Manuel Peguero appeared before the United States District Court for the Middle District of Pennsylvania and received a sentence of 22 years, 10 months imprisonment (J.A. 56). The judge did not advise Mr. Peguero of his appellate rights, as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure [now Rule 32(c)(5)]. No direct appeal was filed. In 1996, Mr. Peguero filed a motion under 28 U.S.C. § 2255 requesting, *inter alia*, the reinstatement of his right to pursue a direct appeal (J.A. 58).

There is a split among the circuits regarding the legal standard applicable when a federal prisoner seeks post-conviction relief based upon the district court's failure to

advise him of his appellate rights. Under the majority rule reflected in the published decisions of seven circuits, defendant's right to a direct appeal is reinstated on a *per se* basis; under the minority rule adopted by two circuits, the district court must hold a hearing to determine whether the defendant was prejudiced by the judge's omission. See *Thompson v. United States*, 111 F.3d 109, 110 (CA11 1997) (collecting cases). In the instant case, the district court applied the minority rule and denied relief under 28 U.S.C. § 2255 (J.A. 168, 183-84). The district court's order was affirmed in the United States Court of Appeals for the Third Circuit (J.A. 192). Petitioner seeks application of the majority rule. Certiorari was granted on September 29, 1998.

### 2. The Charge and the Plea

On April 3, 1990, an indictment was filed in the United States District Court for the Middle District of Pennsylvania charging the petitioner, Manuel DeJesus Peguero, with five violations of federal drug law (J.A. 16). Count one charged conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846; count two charged distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; count three charged distribution of cocaine in a school zone, in violation of 21 U.S.C. § 845a and 18 U.S.C. § 2; count four charged using a minor in a drug conspiracy, in violation of 21 U.S.C. § 845b; and count five charged maintaining premises to further a drug crime, in violation of 21 U.S.C. § 856. Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, a private attorney, L. Rex Bickley, was appointed to represent Mr. Peguero (J.A. 2, 4, Items 9 and 20).



On January 6, 1992, Mr. Peguero appeared with counsel for a guilty plea hearing before the Honorable William W. Caldwell of the United States District Court for the Middle District of Pennsylvania (J.A. 22). Pursuant to a written agreement, Mr. Peguero agreed to plead guilty to count one of the indictment, charging conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 (J.A. 80). Paragraph 10 of the plea agreement provided that Mr. Peguero would cooperate with authorities, and in exchange the government agreed to consider moving for a downward departure for substantial assistance (J.A. 23, 83-84).

### 3. Sentencing and the Failure to Notify of Appellate Rights

A sentencing hearing was conducted on April 22, 1992 (J.A. 35). The record reflects that the prosecutor was not satisfied with the defendant's cooperation and did not move for a downward departure (J.A. 43). The district court imposed a sentence of 274 months (22 years, 10 months) imprisonment, plus five years supervised release (J.A. 56).

At the time sentence was imposed, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that after imposing sentence, "the court shall advise the defendant of any right to appeal the sentence." Rule 32(a)(2) of the Federal Rules of Criminal Procedure, as amended, effective December 1, 1989. Order of the Supreme Court, April 25, 1989, 490 U.S. 1135, 1140. Similar language now appears at Criminal Rule 32(c)(5).

The record reflects that the judge did not advise Mr. Peguero of his right to appeal at the sentencing hearing (J.A. 35-57), or at the guilty plea hearing (J.A. 22-34). Additionally, the written plea agreement did not contain any language putting Mr. Peguero on notice of his right to appeal (J.A. 80-91). No direct appeal was filed.

### 4. Defendant's Motion for Post-Conviction Relief

On December 10, 1996, Mr. Peguero filed a *pro se* motion for post-conviction relief under 28 U.S.C. § 2255 (J.A. 58). The motion alleged, *inter alia*, that counsel had been ineffective in failing to file a direct appeal; in this regard, Mr. Peguero asserted that "although requested, no appeal filed by counsel" (J.A. 65). A responsive brief was filed by the government (J.A. 10, Item 57), and the Federal Public Defender was appointed to represent Mr. Peguero (J.A. 11, Item 65).

On June 4, 1997, the Federal Public Defender filed an amended petition under 28 U.S.C. § 2255, adding the claim that the district court had failed to advise the defendant of his appellate rights as required by the former Criminal Rule 32(a)(2) [currently, Rule 32(c)(5)] (J.A. 92, 93). In a brief filed in support of the amended petition, counsel cited the Third Circuit decisions in *United States v. Deans*, 436 F.2d 596, 599 n.3 (CA3), *cert. denied*, 403 U.S. 911 (1971), and *Farries v. United States*, 439 F.2d 781 (CA3 1971). Defendant argued that under *Deans* and *Farries*, the district court's failure to comply with Rule 32(a)(2) required, as a matter of law, that the defendant be resentenced so that he could thereafter file a timely notice of appeal (J.A. 12, Item 72).



The Federal Public Defender raised two other claims on behalf of Mr. Peguero. In an evidentiary hearing memorandum, counsel noted that the petitioner had preserved a claim regarding the conduct of the guilty plea hearing (J.A.12, Item 75). Additionally, counsel filed a memorandum requesting that the district court consider a downward departure for post-conviction rehabilitation pursuant to the recent Third Circuit decision in *United States v. Sally*, 116 F.3d 76 (CA3 1997) (J.A.12, Item 73).

### 5. The Evidentiary Hearing

An evidentiary hearing was conducted on June 10, 1997, before the Honorable William W. Caldwell of the United States District Court for the Middle District of Pennsylvania (J.A. 94). At this hearing, the prior attorney, Mr. Bickley, and the defendant, Mr. Peguero, presented conflicting testimony on the question of whether the defendant had chosen to waive his appellate rights.

Attorney Bickley testified that he informed Mr. Peguero of his right to appeal, but that Mr. Peguero wanted to cooperate with the authorities and did not want counsel to take an appeal (J.A. 104-05). Mr. Bickley was not sure whether this conversation occurred before or after the sentencing hearing (J.A. 123). Prior counsel was unable to produce any documentary evidence to support his claim that he had informed the defendant of the right to appeal. He did not write a letter to the client (J.A. 105), and did not dictate a memo to his file (J.A. 105). When asked whether he noted on his file that the defendant was waiving his appellate rights, Mr. Bickley responded "[i]f I did, I can't find it." (J.A. 105).

By contrast, Mr. Peguero testified that immediately after the sentencing, he asked his attorney to file an appeal (J.A. 138-39, 153). He further testified that he sent Mr. Bickley a letter directing his attorney to file the appeal (J.A. 139, 155-159). Mr. Peguero was cross-examined regarding the authenticity of the letter (J.A. 156-160), and a copy of the letter was admitted as government exhibit No. 1 (J.A. 160, 166-67). Mr. Bickley was recalled to the witness stand by the government, and testified that he never received any such letter (J.A. 163-64).

### 6. Ruling by the District Court

By unpublished memorandum and order dated July 1, 1997, the district court denied defendant's motion for post-conviction relief (J.A. 168). The district court accepted counsel's version of events, discounted Mr. Peguero's version of events, and found that "the defendant knew about his right to appeal and decided not to exercise it." (J.A. 184). In addressing the failure to advise the defendant of his appellate rights, as required by former Rule 32(a)(2), current Rule 32(c)(5) of the Federal Rules of Criminal Procedure, the district court denied relief, citing this Court's decision in *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085 (1979) (J.A. 184).

On July 29, 1997, Mr. Peguero filed a request for a certificate of appealability on the Rule 32(a)(2) issue (J.A. 188). The prosecutor concurred in the request (J.A. 190), and the district court granted the certificate (J.A. 191). A timely notice of appeal was filed on July 30, 1997 (J.A. 13, Item 83).

### 7. Appeal in the Third Circuit

In his brief in the United States Court of Appeals for the Third Circuit, Mr. Peguero did not challenge the factual findings of the district court. Rather, Mr. Peguero cited the Third Circuit precedents in *United States v. Deans*, 436 F.2d 596 (CA3 1971) and *Farries v. United States*, 439 F.2d 781 (CA3 1971) and again argued that reinstatement of the right to appeal was required as a matter of law (J.A. 15, docket entry of 9/26/97). By an unpublished memorandum and order, the court of appeals affirmed the order denying post-conviction relief (J.A. 192). There was no discussion of the Third Circuit precedents.

### 8. The Petition for Writ of Certiorari

Mr. Peguero filed a timely petition for writ of certiorari, seeking relief from the judgment of the court of appeals. In support of his request for certiorari review, petitioner noted a conflict among the courts of appeals regarding the legal standard to be applied when a prisoner files a petition under 28 U.S.C. § 2255, claiming that the district court failed to notify the defendant of his appellate rights, as required by the former Rule 32(a)(2), the current Rule 32(c)(5) of the Federal Rules of Criminal Procedure.

The majority rule, reflected in the published decisions of seven circuits, provides that failure to advise the defendant of his appellate rights constitutes error *per se*, requiring that the defendant be resentenced so that he or she might thereafter file a timely notice of appeal. *United States v. Benthien*, 434 F.2d 1031, 1032 (CA1 1970); *Reid v. United States*, 69 F.3d 688, 689 (CA2 1995); *United States v.*

*Deans*, 436 F.2d 596, 598-99 (CA3 1971); *Paige v. United States*, 443 F.2d 781, 782 (CA4 1971); *United States v. Butler*, 938 F.2d 702, 703-04 (CA6 1991); *Thompson v. United States*, 111 F.3d 109, 110-11 (CA11 1997) (collecting cases); and *United States v. Sanchez*, 88 F.3d 1243, 1246-47 (CA10 1996).

Courts in the majority have recognized three situations where the *per se* rule is not applicable. First, the Third Circuit will not grant relief where the record reflects that the district court judge advised the defendant of his appellate rights at a guilty plea hearing held close in time to the sentencing hearing. *Hoskins v. United States*, 462 F.2d 271, 274-75 (CA3 1972). Second, the Eleventh Circuit will not entertain the claim where the defendant did, in fact, file a timely appeal. *United States v. Chang*, 142 F.3d 1251 (CA11 1998). Third, the Second and Sixth Circuits will deny relief where the defendant signed a plea agreement expressly waiving the right to appeal. *Valente v. United States*, 111 F.3d 290, 293 (CA2 1997); *Everard v. United States*, 102 F.3d 763, 765-66 (CA6 1996), *cert. denied*, 519 U.S. 1139 (1997).

A minority approach, applied by two circuits, requires that evidentiary hearings be conducted to determine whether the defendant was prejudiced by the violation of Rule 32(a)(2). *United States v. Drummond*, 903 F.2d 1171, 1174 (CA8 1990), *cert. denied*, 498 U.S. 1049 (1991) and *Tress v. United States*, 87 F.3d 188, 189 (CA7 1996). The Eighth Circuit puts the burden on the government to prove by clear and convincing evidence that the defendant waived his right to an appeal. *United States v. Drummond*, *supra*, 903 F.2d at 1174. The Seventh Circuit also places the burden of proof on the government, but has



not yet ruled on the applicable standard of proof. *Tress v. United States*, *supra*, 87 F.3d at 190.

In seeking the reinstatement of his right to a direct appeal, Mr. Peguero relies exclusively on the majority rule. He argues that relief should be granted as a matter of law, because the failure to inform a defendant of his appellate rights is "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962), *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

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#### SUMMARY OF THE ARGUMENT

Petitioner Manuel Peguero is serving a sentence of 22 years, 10 months imprisonment on a federal conviction for drug conspiracy. At sentencing, the district court failed to advise him of his appellate rights, as required by the then-applicable version of Rule 32(a)(2) of the Federal Rules of Criminal Procedure. No direct appeal was filed, and petitioner sought post-conviction relief under 28 U.S.C. § 2255. Following an evidentiary hearing, the district court denied relief, finding that Mr. Peguero "knew about his right to appeal and decided not to exercise it" (J.A. 183-84). The district court order was affirmed in the court of appeals (J.A. 192). Mr. Peguero seeks reinstatement of his right to a direct appeal.

The petitioner is entitled to relief under 28 U.S.C. § 2255, notwithstanding the absence of demonstrated prejudice, because the district court's failure to advise him of his appellate rights constitutes "an omission

inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979). Relying upon the approach taken in the majority of federal circuits, petitioner seeks application of a *per se* rule of relief. *Thompson v. United States*, 111 F.3d 109, 110 (CA11 1997) (collecting cases).

The rule requiring judicial notification of appellate rights protects the defendant's "fundamental decision" on whether to pursue a direct appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). Absent a judicial warning, there is a genuine risk that the defendant will never be made aware of his opportunity to pursue a direct appeal. *Advisory Committee Notes to the 1966 Amendment to Criminal Rule 32(a)(2)*. For this reason, violation of the "advice of rights" rule presents an unusual structural error which cannot be effectively addressed through direct appeal.

Where the transcript of the sentencing hearing reflects an omission of the judicial warning, the majority *per se* approach permits the district court judge to issue an order reinstating the right to appeal and directing the clerk to file a notice of appeal on behalf of the defendant. *Gaeta v. United States*, 921 F.Supp. 864 (D. Mass. 1996) (Tauro, C.J.). Under the minority rule, by contrast, the district court must hold an evidentiary hearing to determine whether the defendant was prejudiced by the judge's omission of the appellate notice. The interests of judicial efficiency thus weigh in favor of the majority rule.

Petitioner requests that the judgment of the court of appeals be reversed, and that his right to a direct appeal be reinstated.

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### ARGUMENT

**THE DISTRICT COURT'S FAILURE TO INFORM THE DEFENDANT OF HIS APPELLATE RIGHTS CONSTITUTES "AN OMISSION INCONSISTENT WITH THE RUDIMENTARY DEMANDS OF FAIR PROCEDURE," THUS JUSTIFYING POST-CONVICTION RELIEF WITHOUT PROOF OF SPECIFIC PREJUDICE.**

When a federal prisoner seeks post-conviction relief based upon the violation of a federal rule of criminal procedure, his claim must satisfy a demanding legal standard. To prevail under 28 U.S.C. § 2255, the prisoner must show that the procedural violation constituted either "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962), *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

Petitioner asserts that there is at least one procedural protection that should be numbered among the rudimentary demands of fair procedure. It is the procedural protection afforded when, at the conclusion of the sentencing hearing, the judge informs the defendant of the right to pursue a direct appeal. That procedural protection, reflected at the current Rule 32(c)(5), the former Rule 32(a)(2) of the Federal Rules of Criminal Procedure, is protected on a *per se* basis in the majority of federal

circuits. Under this approach, the defendant's appellate rights are reinstated when the transcript of the sentencing hearing reflects that the judge omitted the required notice. *Thompson v. United States*, 111 F.3d 109, 110 (CA11 1997) (collecting cases).

There are five reasons why the district court's failure to warn the defendant of his appellate rights should be considered "an omission inconsistent with the rudimentary demands of fair procedure," thus justifying post-conviction relief as a matter of law. First, the rule protects a decision deemed by this court to be fundamental – the defendant's decision whether to pursue an appeal. Second, experience shows that absent a warning from the judge, there is a genuine risk that criminal defendants will lose the opportunity to pursue an appeal. Third, violation of the "advice of rights" rule is an unusual structural error which justifies relief as a matter of law. Fourth, application of a prejudice analysis risks unreliable results. Fifth, application of the *per se* rule promotes judicial efficiency.

#### **1. The Rule Protects a Decision Deemed by this Court to be Fundamental – The Defendant's Decision Whether to Pursue an Appeal**

This Court has recognized that a defendant has the ultimate authority to make four "fundamental decisions" during the course of criminal litigation: the defendant must personally decide whether to plead guilty, whether to waive a jury, whether to testify in his or her own behalf, and whether to take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). The personal



nature of the defendant's choice regarding appeal is reflected in two relevant standards of legal ethics. The ABA Model Code of Professional Responsibility, at Ethical Consideration 7-7, states that "it is for the client to decide what plea should be entered and whether an appeal should be taken." Similarly, the Second Edition of the ABA Standards for Criminal Justice provides, at Standard 4-8.2(a), that "[t]he decision whether to appeal must be the defendant's own choice." A third standard, at Rule 1.2(a) of the ABA Model Rules of Professional Conduct, does not refer to the personal nature of the defendant's appellate choice.

Ideally, it is the defense attorney who will assure that the defendant gets the guidance he or she needs to make the "fundamental decision" regarding appeal. Under the ABA Model Code of Professional Responsibility, Ethical Consideration 7-7, it is the duty of counsel to fully advise the client regarding the prospects of success on appeal. A similar duty is recognized at Standard 4-8.2(a) of the ABA Standards for Criminal Justice (2nd Edition).

If these ethical obligations were observed with consistency, there would be no need for the judge to provide an additional notice of appellate rights. Unfortunately, experience shows that ethical considerations alone are insufficient to assure that all defendants are properly advised regarding their opportunity to pursue a direct appeal.

## **2. Experience Shows that Absent a Warning from the Judge, There is a Genuine Risk that Criminal Defendants Will Lose the Opportunity to Pursue an Appeal**

Effective July 1, 1966, Rule 32 of the Federal Rules of Criminal Procedure was amended, at Rule 32(a)(2), to provide that after sentencing in a case that had gone to trial on a plea of not guilty, the court was obligated to advise the defendant of the right to an appeal and the right to proceed in forma pauperis. Order of the Supreme Court, February 28, 1966, 383 U.S. 1087, 1107. The 1966 amendment reflects a concern that absent a warning from the district court judge, criminal defendants might never be made aware of their appellate rights – *even if the defendants are represented by counsel*. The point is made clearly in the Advisory Committee Notes to the 1966 Amendment at Criminal Rule 32(a)(2):

The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See e.g., *Hodges v. United States*, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without

funds to apply for leave to appeal in forma pauperis.

18 U.S.C.A., Federal Rules of Criminal Procedure, Rule 32, page 12 (West Publishing, 1976).

The concerns of the Advisory Committee are reflected in the Second Edition of the ABA Standards for Criminal Justice. The commentary to Standard 4-8.2 reflects that "a considerable body of postconviction litigation has been generated involving failures on the part of trial counsel to protect the defendant's right of appeal . . . [t]he fact situations out of which many cases have arisen indicate genuine uncertainty on the part of lawyers concerning their responsibilities after verdict."

Practical experience thus suggests that absent a warning from the judge, there is a genuine risk that defendants will lose the opportunity to choose an appeal. Because the choice is fundamental, the rule which protects that choice is fundamental, and should be treated as a rudimentary demand of fair procedure.

### **3. Failure to Advise the Defendant of His Appellate Rights Is an Unusual Structural Error Which Justifies Relief as a Matter of Law**

Under the former Criminal Rule 32(a)(2), the current Criminal Rule 32(c)(5), the responsibility rests with the district court judge to advise the defendant of his appellate rights. The district court's failure to meet this responsibility produces an unusual structural error. The error is unusual because the normal mechanisms of criminal and appellate procedure do not provide an adequate remedy.

Customarily, when the district court makes an error of law, it is expected that defense counsel will object or take some other action to correct the error. Thus, when the district court judge fails to advise the defendant of his right to appeal, the preferred course of action is for defense counsel to request, on the record, that the defendant be warned of his appellate rights. This request will not be made, however, if the defense attorney is himself misinformed regarding the defendant's right to appeal – and the requirement of a judicial warning was included in Rule 32 precisely because of the well-founded concern that defense attorneys *were* misinformed regarding the right of appeal. For this reason, the first line of defense, an objection by defense counsel in the district court, is an inadequate remedy for violations of Criminal Rule 32(a)(2).

The second line of defense, a direct appeal, is also an inadequate remedy for violations of Criminal Rule 32(a)(2). Defendants cannot be expected to file appeals if they are unaware of their appellate rights. When there is no warning from the district court judge, there is an unacceptable risk that defendants will remain ignorant of their appellate rights. For this reason, the availability of a direct appeal is an inadequate remedy for violations of the "notice of appeal" rule.

The absence of effective corrective mechanisms in the district court and on direct appeal is relevant to the question of whether to grant post-conviction relief. In *Timmreck*, this Court rejected a post-conviction claim under Criminal Rule 11, noting that the claim "could have been raised on direct appeal . . . but was not." *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085,



2087 (1979). The Court went on to observe that there was no basis for allowing Timmreck's collateral attack "to do service for an appeal." *Id.*, quoting *Sunal v. Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590 (1947).

When dealing with violations of Criminal Rule 32(a)(2), there is a basis for allowing the petitioner's collateral attack to do service for an appeal. This is because the absence of a judicial warning may effectively undermine the defendant's ability to take a direct appeal. Criminal Rule 32(a)(2) thus presents an unusual structural error for which the rules of criminal and appellate procedure do not provide an effective remedy. Because the absence of judicial notice may undermine the defendant's access to a direct appeal, violation of Criminal Rule 32(a)(2) should be treated as "an omission inconsistent with the rudimentary demands of fair procedure," justifying relief as a matter of law.

#### 4. Application of a Prejudice Analysis Risks Unreliable Results

Under the minority rule applied by the Seventh and Eight Circuits, the district court must hold an evidentiary hearing to determine whether the defendant was prejudiced by the judge's failure to advise the defendant of his or her appellate rights. In many cases, the district court will be required to assess the conflicting recollections of the defendant and the former attorney. The attorney may honestly believe that she fulfilled her responsibilities regarding the advice of appellate rights. Without documentary support, however, the attorney's recollection may be unreliable. As noted by the First Circuit, "[t]he

natural tendency of counsel is to believe they have fully performed their duties when in fact they may not have. . . ." *United States v. Benthien*, 434 F.2d 1031, 1032 (CA1 1970) (adopting *per se* rule). The potential for injustice is illustrated by the case of *United States v. Deans*, 436 F.2d 596 (CA3 1971).

In *Deans*, the defendant filed a petition for relief under 28 U.S.C. § 2255 alleging, *inter alia*, that he had not been advised of his right to appeal as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. The defense attorney provided the prosecutor with an affidavit alleging that, at the time of sentencing, "Mr. Deans was advised both by myself and by the court that he had a right to appeal this conviction and that if he could not afford an attorney, one would be provided for him." *Id.* at 599, note 3. Subsequently, the court of appeals secured a copy of the sentencing transcript, and the transcript reflected that the district court had *not* informed the defendant of his right to appeal or his right to appointed counsel. The court of appeals determined that it would give no weight to counsel's recollections, and ruled that there was no adequate substitute for compliance on the record with Rule 32(a)(2). *Id.*

There are many reasons why a defense attorney might mistakenly testify that he advised the defendant regarding the right to appeal. An attorney who customarily advises clients regarding the right to appeal might mistakenly assume that he followed his normal practice. An attorney with a high volume of cases might mistakenly confuse past clients. Additionally, an attorney dependent upon court appointments might fear the loss of those appointments if he admits that he failed to

properly advise a defendant. Particularly where there is no letter to the client and no memorandum to the file, there is a genuine risk that counsel will mistakenly recall having advised the defendant of his or her appellate rights. This risk is avoided by adopting the *per se* rule.

### 5. The *Per Se* Rule Promotes Judicial Efficiency

Under the majority rule, the right to pursue a direct appeal is reinstated where the defendant is able to show, through the existing district court record, that the judge did not warn the defendant of his appellate rights. One benefit of this approach has been repeatedly recognized: the *per se* rule prevents excessive litigation and promotes judicial efficiency. See *Reid v. United States*, 69 F.3d 688, 689 (CA2 1995) ("We remain persuaded that the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2)"); *United States v. Sanchez*, 88 F.3d 1243, 1247 (CADDC 1996) (same); *Thompson v. United States*, 111 F.3d 109, 111 (CA11 1997) (same). The interests of judicial efficiency weigh heavily in favor of the *per se* rule.

In the circuits where a *per se* rule is applied, there is no need for an evidentiary hearing. A review of the sentencing transcript reveals whether or not the notice was given. If the judicial notice was omitted, the district court vacates the judgment of sentence and resentsences the defendant, so that he or she may thereafter file a timely notice of appeal. *Thompson v. United States*, *supra*, 111 F.3d at 110 (collecting cases). Indeed, a recent district court case suggests that the process may be streamlined even further.

In *Gaeta v. United States*, 921 F.Supp 864 (D. Mass 1996) (Tauro, C.J.), the defendant filed a petition under 28 U.S.C. § 2255 seeking to vacate his sentence on the ground that the district court had failed to advise him of his right to appeal. The district court granted relief, and vacated the judgment of sentence. Rather than bring the parties to the courthouse for a sentencing hearing, however, the district court simply issued an order reinstating the right to appeal and directing the clerk to file a notice of appeal on behalf of the defendant.

The procedure utilized in *Gaeta* is simple to apply. It avoids unnecessary hearings and allows the prompt disposition of *pro se* petitions. The *Gaeta* decision thus reflects that the majority rule, which reinstates appellate rights based upon the existing district court record, is far less burdensome than the minority rule, which requires evidentiary hearings and credibility assessments in every case. For these reasons, the interests of judicial efficiency weigh in favor of the majority rule.

In summary, where no direct appeal was filed, there is good reason to find that the judge's failure to warn a defendant of his appellate rights constitutes "an omission inconsistent with the rudimentary demands of fair procedure," thus justifying post-conviction relief as a matter of law. The rule protects the defendant's ability to choose an appeal, a choice which can easily be lost if the defendant is not warned of his rights on the record. The normal mechanisms of criminal and appellate procedure are inadequate to correct violations of the rule. Additionally, the interests of judicial efficiency are best served by a simple remedy which permits a prompt resolution based upon the existing district court record.



For all these reasons, it is requested that this court hold that the district court's failure to notify the defendant of his appellate rights justifies post-conviction relief as a matter of law. The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to reinstate petitioner's right to take a direct appeal.

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CONCLUSION

It is respectfully requested that the judgment of the United States Court of Appeals for the Third Circuit be reversed, and that the case be remanded with instructions to reinstate petitioner's right to take a direct appeal.

Respectfully submitted,

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